Mistake No. 1: Not Paying for Compensable Travel
Portal-to-Portal Travel

• The Rule

• But . . . stopping along the way

• Carpooling

Overnight Travel

• When it applies

• The driver is always working

• Overnight travel as a passenger is compensable working time when . . .
Mistake No. 2: Not Understanding How to Deal with the Injured Employee or the Employee with a Medical Condition

Addressing Medical Issues at Work

- Generally, talk about medical conditions is off limits
- Performance issues?
- Information becomes known?
- A medical issue is observed
Applicable Laws to Consider

- Consider the Law:
- The Americans with Disabilities Act
- The Family Medical Leave Act

Mistake No. 3: Failing to Publish Accurate Job Descriptions
Job Descriptions

- The ADA necessitates the use of job descriptions
- Assists with defenses to Title VII claims
- May help to defeat claims for overtime

Job Descriptions

- Be sure to include:
  - Attendance standards
  - Lifting requirements
  - Availability to work overtime or weekends
  - Travel requirements
  - Supervisory duties
  - Exempt duties

- Make sure job descriptions are accurate and up to date
Mistake No. 4: Failing to Document Disciplinary Actions and Performance

Avoiding Mistake No. 4

- Publish a disciplinary policy, then follow it!
- Verbal warnings should be in writing
- Identify any prior counseling and failure to correct issues
- State the facts, be objective and avoid opinions
- Allow the employee an opportunity to sign the document, or note the refusal to sign
Mistake No. 5: Failing to Obtain a Release or Severance Agreement from a Terminated Employee

• Consider whether the agreement is worth the risk
  – Is the employee in a protected category?
  – Will there be a replacement? Is the replacement in a difference protected category?
  – Has the employee recently engaged in protected activity?
  – The agreement may leave the employee considering whether they have a legal claim
Avoiding Mistake No. 5

• An enforceable agreement must provide “consideration”
  – The employee must be given something other than what they are already entitled to
• Consult with an attorney to obtain an enforceable release from ADEA claims

Mistake No. 6:
Thinking You Have A Strong Misconduct Defense
The Unforeseeable Employee Misconduct Defense

- Work rules
- Training
- Self-Inspections
- Discipline

Avoiding Mistake No. 6

- Maintain safety manuals in all necessary languages
- Keep training documents organized
- Focus training on most common hazards
- Conduct self-inspections and document same
- Administer effective discipline
Mistake No. 7: Not Understanding Controlling Employer Liability

The Controlling Employer

- You can be cited as the controlling employer if:
  - You exercise sufficient control over the worksite to prevent or detect and abate a hazardous condition created by a subcontractor
  - You could reasonably be expected to prevent violations due to your supervisory authority and control of the worksite
The Controlling Employer

• Liability can be avoided if:
  – You are exercising reasonable care to prevent and detect violations
• Standard of care

Mistake No. 8: Treating Employees as Independent Contractors
Common Law Test

- Seven Factors:
  - the degree of control exercised by the principal over the details of the work
  - which party invests in the facilities used by the worker
  - the opportunity of the worker for profit or loss
  - whether the principal can discharge the worker
  - whether the work is part of the principal’s regular business
  - the permanency of the relationship
  - the relationship the parties believed they were creating

Avoiding Mistake No. 8

- Conduct a relationship audit
- Use formal contracts with independent contractors
- Ensure independent contractors maintain their own corporate documents
- Do not repeatedly and continuously engage the same independent contractors
Mistake No. 9: Not Properly Completing or Maintaining Form I-9s

- There is a new Form I-9 that became effective on September 18, 2017
- Since September 18, 2017, employers have been required to use the 07/17/2017 N version
- Conduct an annual audit of your Form I-9s
- Know the Form I-9 record retention rules
Mistake No. 10: Not Having A Non-Compete and/or Non-Solicitation Agreement

• Without a Restrictive Covenants Agreement, former employees are free to compete
• Non-Competition Agreements
• Non-Solicitation Agreements
• Non-Solicitation of Employees
• Trade secrets and confidential information
Mistake No. 11: Failing to publish a harassment or discrimination policy

Avoiding Mistake No. 11

- Publish a policy
- Address complaint procedure and retaliation
- Follow the policy . . . And document it!
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